Supreme Court, U.S.
FILED

04.987 DEC 13 2004

OFFICE OF THE CLERK

No.

In The
SUPREME COURT of the UNITED STATES

David H. Zimmer, et al.

Petitioners,

v.

FISERV Securities, Inc., as successor to
FISERV Correspondent Services, Inc.,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR CERTIORARI

David H. Zimmer, Pro Se*
Sherry M. Zimmer, Pro Se
Petitioners
6477 NW 38th Way
Boca Raton, Florida 33496
(561) 239-2526
Lead Petitioner

Sheldon L. Contract, Pro Se
Harriet E. Contract, Pro Se
Petitioners
10401 Strathmore Park Ct.
N. Bethesda, MD 20852
(301) 530-7301

Martin Newman, Pro Se
Petitioner
6970 Hatchery Road
Waterford, Michigan 48327
(248) 886-8657

*Counsel of Record

QUESTIONS PRESENTED

I. Were the arbitrators guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown under U.S.C. § 10(a) of the Federal Arbitration Act?

A. Did the failure of the arbitrators to postpone the hearing preclude their ability to enter evidence only available from discovery in the interrelated Federal Claim?

B. Did the failure of the arbitrators to postpone the hearing enable the Federal Claim defendants an unfair advantage to evidence and information produced in the interrelated arbitration?

II. Were the due process rights of the Petitioners violated under the Section 1 of the Fourteenth Amendment by the failure of the arbitrators to postpone the hearing?

PARTIES TO THE PROCEEDINGS

DAVID H. ZIMMER, both personally and as Trustee of Sherry M. Zimmer Money Purchase Plan, **SHERRY M. ZIMMER,** both personally and as Trustee of the David H. Zimmer Money Purchase Plan, **SHELDON L. CONTRACT,** both personally and as trustee of Sheldon L. Contract DDS PA Employees PSP Dated 9/17/87, **HARRIET E. CONTRACT,** both personally and as trustee of Sheldon L. Contract DDS PA Employees PSP Dated 9/17/87, **MARTIN NEWMAN, Petitioners.**

FISERV Securities, Inc., as successor to **FISERV Correspondent Services, Inc., Respondent.**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	vii
JURISDICTION	vii
AMENDMENTS INVOLVED	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	
A. Introduction	2
B. Factual Background	4
C. Course of Proceedings	5
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. Were the arbitrators guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown under U.S.C. § 10(a) of the Federal Arbitration Act?	8
A. Did the failure of the arbitrators to postpone the hearing preclude Petitioners' the ability to enter evidence only available from discovery in the interrelated Federal Claim?	10

Cases	Page
Matter of Bevona, 204 A.D.2d 136, 611 N.Y.S.2d 193, 195 (N.Y. App. Div. 1994)	*10*
Matter of Insurance Co. of North America, 215 A.D.2d 386, 626 N.Y.S.2d 232	*10*
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)	*2, 7*
Naing v. Ellsworth, et al., 961 F. Supp. 1, 1 (D.D.C. 1997)	*11*
Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997)	*8*
Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987), *aff'd mem.*, 841 F.2d 1117 (2d Cir. 1988)	*9*
Tube & Steel Corp. of America v. Chicago Carbon Steel Products, 319 F. Supp. 1302 (S.D.N.Y. 1970)	*10*
Wilko v. Swan, 346 U.S. 427 (1953)	*2*
Constitutional Amendments	
XIV Amendment	*1*
Statutes	
9 U.S.C. §10(a)	*1, 8*
9 U.S.C. §10 (a)(3)	*1, 8*

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-2a) is unreported but available at *102 Fed. Appx. 190; 2004 U.S. App. LEXIS 11904*. The order of the District Court (Pet. App. 3a-10a) is unreported but available at *2003 U.S. Dist. LEXIS 12230*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 2004. The Petition for Rehearing was denied on September 15, 2004. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

PETITION FOR WRIT OF CERTIORARI FOR PETITIONERS

AMENDMENTS INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

9 U.S.C. § 10(a) of the Federal Arbitration Act

Under 9 U.S.C. § 10(a) of the Federal Arbitration Act ("FAA") , in any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a).

STATEMENT OF THE CASE

A. Introduction

A court's authority to review or set aside an arbitrator's decision 'is among the narrowest known to the law.' For courts 'do not sit to hear claims of factual or legal error by an arbitrator, as an appellate court does in reviewing decisions of lower courts.' Review of arbitral decisions is extremely narrow and extraordinarily deferential. The narrow bases for overturning an arbitration decision are restricted to statutory or judicially created grounds. *Coastal Oil v. Teamsters Local Union No. 25*, 134 F.3d 466, 469 (1st Cir. 1998) (citations omitted).

Four statutory bases are found in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 10, and are limited to circumstances "relating to the breakdown in the integrity of the arbitration process itself." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

This single judicially created basis requires that a decision be made in "manifest disregard of the law.". *Wilko v. Swan*, 346 U.S. 427 (1953). Courts have interpreted and applied these standards extremely narrowly, erecting a formidable barrier for a party seeking to vacate a decision and, for all intents and purposes, rendering an arbitrator's decision final. In cases "of first impression" that arise in the arbitration process, the potential violation of one's due process rights is apparent and evident.

In essence, the extremely limited grounds for reviewing an arbitrator's decision demonstrates that empowering an arbitrator to decide an issue "of first impression" serves, in actuality to authorize a final decision. The factual matrix intertwining this Petition for Writ of Certiorari buttressed by statutory and case law presents an issue "of first impression" one that was envisioned to arise by this Honorable Supreme

Court in its March 4, 1985 decision in Dean Witter Reynolds, Inc. v. Byrd.

In *Dean Witter*, Justice Marshall opined that "the question of what preclusive effect . . . the arbitration proceedings might have is not yet before us . . . and we do not decide it." Justice Marshall opined that 'it is far from certain that arbitration . . . will have any preclusive effect on the litigation of nonarbitrable federal claims.' *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* The factual matrix of this matter suggests that it does in addition to reversing the equation. The failure to stay the arbitration denied Petitioners their due process rights in not being able to present evidence from the nonarbitrable federal claims.

Justice White concurred in *Dean Witter* stating that "[he] can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit." *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* The U.S. Supreme Court, or any other cited case law, mentions or considers anything similar to the fact patterns that emerged in these factually interrelated yet procedurally different matters. The legal arguments buttressing the factual matrix set forth in this Petition for Writ of Certiorari would have undoubtedly fulfilled Justice White's requirement of "other possible reasons." *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* Had the instant fact pattern been before the U.S. Supreme Court in the Dean Witter matter, it is unlikely they could have ruled as to what, if any preclusive the arbitration proceedings might have. It is the Petitioners' belief that if this fact pattern had been before Justice White, he would have ruled in their favor.

The due process rights of the Petitioners were violated by the failure of the arbitration panel to postpone the hearing until after discovery could begin in the interrelated Federal Court case that was actually begun before the arbitration.

Evidence necessary to exonerate or significantly reduce the damages to Petitioners, damages which if judgments become executable at the level of their respective states will deprive them of their property, a proposition squarely defined within the Fourteenth Amendment

B. Factual Background

Petitioners are a group of investors who maintained accounts at Congressional Securities, Inc. for whom Fiserv Securities, Inc. ("Fiserv") acted as clearing agent. Each of the Petitioners purchased shares of Interface Systems, Inc. ("Interface") on margin. When the stock of Interface fell dramatically, Fiserv issued margin calls to the Petitioners.

On or about August 2000, Petitioners commenced an action in United States District Court Southern District of New York ("Federal Claim") against Interface, Fiserv, and their respective officers and employees. Instead of answering the complaint, Fiserv commenced arbitration proceedings against the Petitioners through the National Association of Securities Dealers, Dispute Resolution Inc. ("Arbitration Claim") shortly thereafter.

The claims against Fiserv and Interface in the Federal Claim alleged, among other things, that interactions between named corporate defendants, their officers and employees of Fiserv and Interface, had a detrimental effect on the intrinsic underlying value of Interface shares in the control of Fiserv. The decline in value of these shares, which comprised the Petitioners' collateral on margin, caused the deficit owed Fiserv by the Petitioners to balloon.

Fiserv fought hard and removed itself from the Federal Claim while simultaneously pushing the Arbitration Claim ahead as quickly as possible. The Interface defendants sought to dismiss and change venue of the Federal Claim. On or about July 27, 2001, almost a year after the original

Federal Claim, Case No. 01-73009, had been filed the case was transferred to the United States District Court Eastern District of Michigan, Southern Division. Discovery in this Federal Claim was not scheduled to begin in June of 2002.

Simultaneously the Arbitration Claim surged towards its finality. Counsel for Fiserv sought every remedy possible to move the Arbitration Claim forward knowingly precluding the Petitioners from ever introducing evidence in existence that could only be obtained from discovery in the Federal Claim. Interface defense counsels did everything in their power to impede the progress of the Federal Claim as they were direct beneficiaries of the work product of Fiserv counsel in the Arbitration Claim.

Information and evidence from the Arbitration Claim was available to counsel in the Federal Claim. Discovery in the Federal Claim, that did produce information and evidence critical to the Petitioners' defense in the Arbitration Claim, did not commence until after the Arbitration was completed. In short, the Federal defendants had all of the benefits of information and evidence from the Arbitration Claim at their disposal. The Petitioners however were denied their due process rights with respect to the introduction of evidence in the Arbitration Claim that would have exonerated them or dramatically reduced the award against them that was handed down.

C. Course of Proceedings

Fiserv commenced arbitration against Petitioners through the National Association of Securities Dealers, Dispute Resolution Inc., Case Number 00-03756, on or about August 2000. The arbitration hearing was conducted on May 20th and 21st of 2002 despite Petitioners' request to postpone the hearing and their efforts to stay or injunct the hearing in the United States District Court for the Southern District of New

York. The NASD issued the arbitration panel's award in favor of Fiserv on June 28, 2002.

Fiserv sought to confirm the award and the Petitioners sought to vacate the award in the United States District Court Southern District of New York. Judge John S. Martin, Jr., U.S. District Court for the Southern District of New York confirmed the arbitration award and denied Petitioners' motion to vacate the arbitration award on or about July 14, 2003.

Petitioners filed a timely appeal to the United States Court of Appeals for the Second Circuit on August 12, 2003. The Court of Appeals confirmed the judgment of the District Court on June 17, 2004 and Petitioners timely filed a Petition for Rehearing.

The Court of Appeals denied Petitioners' Petition for Rehearing on September 16, 2004. This Petition for Writ of Certiorari is taken from the decision of the United States Court of Appeals to deny Petitioners Petition for Rehearing on September 16, 2004.

SUMMARY OF ARGUMENT

Four statutory bases are found in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 10, and are limited to circumstances "relating to the breakdown in the integrity of the arbitration process itself." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

In cases "of first impression" that arise in the arbitration process, the potential violation of one's due process rights is apparent and evident. In essence, the extremely limited grounds for reviewing an arbitrator's decision demonstrates that empowering an arbitrator to decide an issue "of first impression" serves, in actuality to authorize a final decision. The factual matrix intertwining this Petition for Writ of Certiorari buttressed by statutory and case law presents an issue "of first impression" one that was envisioned to arise by this Honorable Supreme Court in its March 4, 1985 decision in Dean Witter Reynolds, Inc. v. Byrd.

Justice White concurred in *Dean Witter* stating that "[he] can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit." *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* The U.S. Supreme Court, or any other cited case law, mentions or considers anything similar to the fact patterns that emerged in these factually interrelated yet procedurally different matters. The legal arguments buttressing the factual matrix set forth in this Petition for Writ of Certiorari would have undoubtedly fulfilled Justice White's requirement of "other possible reasons." *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* Had the instant fact pattern been before the U.S. Supreme Court in the Dean Witter matter, it is unlikely they could have ruled as to what, if any preclusive the arbitration proceedings might have. It is the Petitioners' belief that if this fact pattern had been before Justice White, he would have ruled in their favor.

The due process rights of the Petitioners were violated by the failure of the arbitration panel to postpone the hearing until after discovery could begin in the interrelated Federal Claim. Evidence, in existence, necessary to exonerate or significantly reduce the damages to Petitioners, damages which if judgments become executable at the level of their respective states will deprive them of their property, a proposition squarely defined within the Fourteenth Amendment

ARGUMENT

I. Were the arbitrators guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown under U.S.C. § 10(a) of the Federal Arbitration Act?

The FAA authorizes a court to vacate an arbitration award in four instances: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior that prejudiced a party's rights; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a).

The question is whether the panel's refusal to postpone a hearing to allow evidence and deposition testimony from an interrelated matter amounts to fundamental unfairness and misconduct sufficient to vacate the arbitration award pursuant to section 10(a)(3) of the Act. Although not required to hear all the evidence proffered by a party, an arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19 (2d Cir.

1997) citing, *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985). ("The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award." (quoting *Transit Cas. Co. v. Trenwick Reinsurance Co.*, 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987), *aff'd mem.*, 841 F.2d 1117 (2d Cir. 1988). A court may vacate an arbitration decision when an arbitrator has refused to postpone a hearing upon sufficient cause shown, 9 U.S.C. § 10(a)(3). *Floyd County Bd. of Educ. v. EUA Cogenex Corp.*, 19 F. Supp. 2d 735 (E.D. Ky. 1998), *rev'd*, 198 F.3d 245 (6th Cir. 1999) (unpublished) (text at 1999 U.S. App. LEXIS 29692).

The original pleadings in the Federal Claim alluded to interactions between Fiserv and Interface. The only way to prove these issues in the arbitration was to submit testimony and evidence from the Federal matter that was unavailable for use by Petitioners at the time of the arbitration hearing. It was not that the evidence did not exist; it did as depicted by an example in the appendix of evidence that was produced by Interface's CEO in the Federal Claim. (Pet. App. 14a). It was not that the allegations of interaction between the parties were not made, they were, and were more than specific enough to put Fiserv and Interface on notice that their joint actions caused the decrease in the value of Petitioners' Interface shares. The only way for that evidence to come into the arbitration was after discovery was completed in the Federal Claim and defense counsel in the Federal Claim put up roadblocks to obtaining any evidence or information prior to commencement of discovery. The tandem of Fiserv counsel in the arbitration and Interface defense counsel in the Federal Claim made it impossible for Petitioners to present evidence in existence at the arbitration through their joint but separate actions. Defense counsel in the Federal Claim, based upon the discovery, alleged that Fiserv was partially to blame for Petitioners' damages but failed to name Fiserv as a third party defendant in the Federal Claim. (Pet. App. 15a)

As such, in this case, the panel's refusal to postpone the hearings amounted to fundamental unfairness and misconduct sufficient to vacate the award pursuant to section 10(a)(3) of the FAA.

A. Did the failure of the arbitrators to postpone the hearing preclude Petitioners' the ability to enter evidence only available from discovery in the interrelated Federal Claim?

Petitioners believe the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown and in refusing to hear evidence pertinent and material to the controversy; by which the rights of Petitioners were denied. Evidence in existence from the factually interrelated Federal Claim, was unavailable for use in the arbitration hearing. This evidence would have served to support the defense and counterclaims of the Petitioners but its introduction into the arbitration case was precluded by jurisdictional and time based roadblocks. None of the discovery in the Federal Claim had begun and the various witnesses, who possessed that information, not being members of the NASD, were not subject to the jurisdiction of the arbitration case. The fact patterns that buttressed the matters were similar but the witnesses and their respective jurisdictional availabilities were not. As such, evidence, pertinent and material to the controversy, in existence that would have exonerated or substantially reduced the award against Petitioners in the arbitration could not be presented.

The arbitrary denial of a reasonable request for a postponement may serve as grounds for vacating an arbitration award. *Fairchild & Co., Inc. v. Richmond, Fredericksburg and Potomac Railroad Co., 516 F. Supp. 1305, 1313 (D.D.C. 1981)* (citing *Tube & Steel Corp. of America v. Chicago Carbon Steel Products, 319 F. Supp. 1302 (S.D.N.Y. 1970))*. If the failure of an arbitrator to grant a postponement or adjournment results in the foreclosure of the presentation of "pertinent and material evidence," it is an

abuse of discretion. *Insurance Co. of North America v. St. Paul Fire & Marine Insurance Co., 215 A.D.2d 386, 626 N.Y.S.2d 232, 233 (N.Y. App. Div. 1995)* (citing *Matter of Bevona, 204 A.D.2d 136, 611 N.Y.S.2d 193, 195 (N.Y. App. Div. 1994))*. Such is the case with respect to the failure of the arbitrators in this matter to postpone the hearing. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, and in refusing to hear evidence pertinent and material to the controversy that would have altered the outcome.

In *Naing v. Ellsworth*, Judge Sporkin of the U.S. District Court for the District of Columbia ruled that Section 10(a)(3) of the Federal Arbitration Act, 9 U.S.C.S. provided that a United States court in and for the district wherein an arbitration award was made may issue an order vacating the award where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy. *Naing v. Ellsworth, et al., 961 F. Supp. 1, 1 (D.D.C. 1997).* As in *Naing*, evidence unavailable to the arbitration case existed and the arbitrators were aware of its existence yet refused to postpone the hearing. The *Naing* court found *Matter of Insurance Co. of North America, 215 A.D.2d 386, 626 N.Y.S.2d 232,* directly on point. In that case, the Fire Marshal, the agency charged with investigating suspected arson, was involved in a criminal investigation regarding the incident at issue in the private arbitration. The appeals court held that it was error for the arbitrators to have denied a postponement of the arbitration to await the results of that investigation, and vacated the arbitration award on that ground. Petitioners are worthy of the same decision.

Similarly, the arbitration panel in this case should have allowed the Federal Claim to conclude, or to at least allow for the discovery phases to complete, before conducting the hearing. Regardless of whether the results would have exonerated or condemned Petitioners, the arbitrators' conclusions clearly were less informed without the omitted

information. Evidence in existence that become available to Petitioners once the discovery phase of the Federal Claim had proceeded supports and verifies the allegations of the Petitioners' initial averments found in the original claims filed against Fiserv in the Federal Claim. (Pet. App. 14a). The evidence is powerful and illustrates the development of a relationship and continued interaction between Fiserv and Interface that served the best interests of Fiserv and Interface to the detriment of the Petitioners.

In *Dexter*, Petitioner invoked those cases which have eschewed a strict reading of *9 U.S.C.A. §10* and created a basic requirement that an arbitrator must grant the parties "a fundamentally fair hearing." *Dexter v. Prudential Insurance, et al., 1999 U.S. Dist. LEXIS 3141, at *4 (10th Cir. 1999).* See also *Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985)* (vacatur appropriate when exclusion of relevant evidence "so affects the rights of a party" as to deny fair hearing); *Hall v. Eastern Air Lines, Inc., 511 F.2d 663, 663-64 (5th Cir. 1975)* (review not foreclosed where petitioner alleges denial of fundamental due process.) The court held against *Dexter* as she was able to call witnesses and present evidence critical to her case whereas Petitioners, in this matter, were unable to even call witnesses or present deposed testimony or known to exist discoverable evidence critical to their defense thus precluding any opportunity for a "fundamentally fair hearing."

The reason for the postponement in the arbitration matter was to enable Petitioners to call witnesses, present or compel testimony from any of the Federal Claim defendants in the arbitration forum. The arbitration hearing was completed prior to commencement of discovery in the Federal Claim. Depositions of those not available to be called to testify in the arbitration hearing did not exist. None of the primary and critical witnesses in the Federal Claim, Interface officers, employees, directors or witnesses could have been compelled to testify in the arbitration. There was no obligation for any of them to testify or submit information and defense counsel

in the Federal Claim made that known to Petitioners. Unlike Petitioners, they were not forced to testify at a prematurely held arbitration hearing where their testimony would have undermined their own defense in the Federal Claim. As such, the failure of the arbitrators to postpone the hearing precluded Petitioners' the ability to enter evidence only available from discovery in the interrelated Federal Claim.

B. Did the failure of the arbitrators to postpone the hearing prejudice the Petitioners in the Federal Claim enabling the Federal Claim defendants an extraordinary advantage to evidence and information produced in the interrelated Arbitration Claim?

The fact that Petitioners were denied their right to present evidence in existence at the arbitration is further buttressed by the fact that evidence and information from the arbitration became openly and easily available to the defendants in the Federal Claim. Access and intended use is proven by a subpoena issued by counsel for defendants in the Federal Claim served upon counsel for Fiserv in the arbitration five months after the arbitration case had been decided. (Pet. App. 13a).

Although a plethora of case law is available dealing with requests to stay related Federal litigation pending resolution of arbitrable claims no evidence of case law requesting to stay arbitrable claims pending resolution of related Federal matters could be uncovered. This issue presents a case of first impression. Courts consistently allow arbitration and federal litigation to proceed simultaneously. *Chang v. Lin, 824 F.2d 219, 222 (2d. Cir. 1987)*. As explained by Justice White in *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985)* once it is decided that [claims] are to go forward independently, the concerns for speedy resolution suggests that neither should be delayed. *Dean Witter, 470 U.S. at 225* (White, J. concurring).

This matter although similar is quite different from *Dean Witter* and its progeny and is a case of first impression for this Honorable Court. Unlike any of the case law citing *Dean Witter*, no construction existed or was contemplated for the fact patterns that infiltrate and control these interrelated Federal and arbitration matters. It was never the intention of the Petitioners to delay the Federal Claim. It was Petitioners' desire to hasten the Federal Claim so as ameliorate their due process rights being violated. Fiserv did everything in its power to delay the Federal Claim while simultaneously pushing the timetable on the arbitration matter. Evidence, only available from the discovery and testimony of Federal Claim witnesses and defendants, strongly supported Petitioners' defense and counterclaims in the arbitration matter. The failure to postpone the arbitration not only denied Petitioners their right to a fair hearing, it enhanced the Interface defendants' case against Petitioners in the Federal Case.

Unlike *Dean Witter*, no preclusive, *res judicata* or collateral-estoppel effects were at issue with respect to the litigation of the Federal Claim. One injustice that resulted from the failure of the arbitration panel to postpone the hearing was that the Federal Claim defense team was given an edge. Being fully aware of the on-going arbitration case, the Federal Claim defense received a tremendously unfair advantage with respect to obtaining testimony, documents and other information through the arbitration forum that would have otherwise been outside of their reach. (Pet. App. 13a).

In *Dean Witter*, Justice Marshall opined that "the question of what preclusive effect . . . the arbitration proceedings might have is not yet before us . . . and we do not decide it." Justice Marshall opined that 'it is far from certain that arbitration . . . will have any preclusive effect on the litigation of nonarbitrable federal claims.' *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* The factual matrix of this matter suggests

that there is a preclusive effect but the equation is reversed. The failure to stay the arbitration denied Petitioners their due process rights in not being able to present evidence from the nonarbitrable federal claims. Additionally, it provided the Interface defense counsel with a three page tool, a subpoena, that enabled production of every single document produced in the arbitration with the stroke of a pen.

Justice White concurred in *Dean Witter* stating that "[he] can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit." *Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* The U.S. Supreme Court, or any other cited case law, mentions or considers anything similar to the fact patterns that emerged in these factually interrelated yet procedurally different matters. The legal arguments buttressing the factual matrix set forth in this Petition for Writ of Certiorari would have undoubtedly fulfilled Justice White's requirement of "other possible reasons." Had the instant fact pattern been before the U.S. Supreme Court in the Dean Witter matter, it is unlikely the Court could have ruled as to what, if any preclusive the arbitration proceedings might have. It is the Petitioners' belief that if this fact pattern had been before Justice White, he would have ruled in their favor. As such, the failure of the arbitrators to postpone the hearing prejudiced the Petitioners in the Federal Claim enabling the Federal Claim defendants an extraordinary advantage to evidence and information produced in the interrelated Arbitration Claim.

II. Were the due process rights of the Petitioners violated under the Section 1 of the Fourteenth Amendment by the failure of the arbitrators to postpone the hearing?

Petitioners' due process rights were denied. They were forced to defend themselves without critical information and testimony available from the related Federal Claim where discovery had yet to commence. Although arbitration is

often an acceptable forum, in this set of circumstances, the arbitration became nothing more than a tool to further subject the Petitioners to additional detriment, problems and injustice in direct violation to their right to due process.

The due process rights of the Petitioners were violated by the failure of the arbitration panel to postpone the hearing until after discovery could begin in the interrelated Federal Claim. Evidence necessary to exonerate or significantly reduce the damages to Petitioners, damages which if judgments become executable at the level of their respective states will deprive them of their property, a proposition squarely defined within the Fourteenth Amendment. As such, the due process rights of the Petitioners were violated under Section 1 of the Fourteenth Amendment by the failure of the arbitrators to postpone the hearing.

CONCLUSION

The extremely limited bases for challenging an arbitral award, both under the FAA and the "manifest disregard" standard, and the significant burden placed on parties seeking to establish one of these bases, demonstrate that allowing an arbitrator to decide "in the first instance" whether a statutory remedy is available notwithstanding an explicit prohibition in the arbitration clause will, in most instances, allow the arbitrator to render a final decision. This result should not be allowed as it creates too large a possibility that an erroneous determination will go unchallenged and flies in the face of the Court's ruling that parties must be able to vindicate their statutory rights in arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

For the above foregoing reasons, the Court of Appeal's decision should be reversed.

Respectfully submitted,

David H. Zimmer, Pro Se
Sherry M. Zimmer, Pro Se
Petitioners
6477 NW 38th Way
Boca Raton, Florida 33496
(561) 239-2526
Lead Petitioner

Sheldon L. Contract, Pro Se
Harriet E. Contract, Pro Se
Petitioners
10401 Strathmore Park Ct.
N. Bethesda, MD 20852
(301) 530-7301

Martin Newman, Pro Se
Petitioner
6970 Hatchery Road
Waterford, Michigan 48327
(248) 886-8657

APPENDIX

CONGRESSIONAL SECURITIES, INC., et al., Petitioners-Appellants, -v.- FISERV SECURITIES, INC., as successor to FISERV CORRESPONDENT SERVICES, INC., Respondent-Appellee.

(03-7943 (L), 03-7945 (Con), 03-7947 (Con), 03-7953 (Con), 03-7955 (Con))

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York (Martin, J,),

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Petitioners-Appellants appeal a judgment that denied their motion to vacate an arbitration award and granted respondent's motion to confirm the award. We assume the parties' familiarity with the underlying facts, procedural history, and specification of the appellate issues.

We may "vacate an arbitration award only in [the] limited circumstances" described in 9 U.S.C. § 10(a). Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997). As relevant to this appeal, Section 10(a)(3) provides for vacatur in "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." "'The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award.'" Tempo Shain, 120 F.3d at 20 (citing and quoting Transit Cas. Co. v. Trentwick Reinsurance Co., 659 F.Supp,

1346, 1354 (S.D.N.Y. 1987), aff'd mem., 841 F.2d 1117 (2d Cir. 1988)). The arbitration panel's refusal to grant petitioners a second adjournment requested shortly before a long scheduled hearing did not deny petitioners "fundamental fairness" because (1) the panel previously had granted a lengthy adjournment over respondent's objection and (2) petitioners made only a speculative and unspecific showing of need for the adjournment. We therefore affirm the judgment of the district court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By: Lucille Carr
Dated: June 17, 2004

CONGRESSIONAL SECURITIES, INC., et al., Petitioners, -v.- FISERV SECURITIES, INC., as successor to FISERV CORRESPONDENT SERVICES, INC., Respondent.

02 Civ. 6593 (JSM), 02 Civ. 7914 (JSM), 02 Civ. 3740 (JSM), 02 Civ. 8364 (JSM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

July 14, 2003, Decided
July 15, 2003, Filed

JUDGES: JOHN S. MARTIN, JR., U.S.D.J.

OPINION BY: JOHN S. MARTIN, JR.

OPINION:

OPINION & ORDER

JOHN S. MARTIN, Jr., District Judge:

Petitioners are a group of investors who maintained accounts at Congressional Securities, Inc. for whom Fiserv Securities, Inc. ("Fiserv") acted as clearing agent. Each of the Petitioners purchased shares of Interface Systems, Inc. ("Interface") on margin. When the stock of Interface fell dramatically, Fiserv issued margin calls to the Petitioners. When the margin calls were not honored, Fiserv commenced arbitration proceedings against the Petitioners and ultimately received an award against each of them which in total amounted to $ 10,445,124.78 plus attorneys fees and interest. Petitioners then commenced this action seeking to vacate the award. Presently before the Court are cross-motions to vacate and confirm the arbitration award.

Petitioners' principal claim is that the arbitrators improperly denied their request for a continuance on the morning of the scheduled hearing when new counsel appeared for them and told the panel that he needed time to prepare. They also contend that the arbitrators acted improperly when they permitted David H. Zimmer to act as their attorney at an earlier stage of the proceedings even though he was also a party to the proceeding and had been the broker for the other parties.

While the parties have cited both New York and federal authorities, this action is governed by the *Federal Arbitration Act* ("FAA"). As the Second Circuit ruled in *Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 120 (2d Cir. 1991)*: "The FAA applies when there is federal subject matter jurisdiction, i.e., diversity jurisdiction ... and when the contract calling for arbitration 'evidences a transaction involving interstate commerce.'" See also *Ottawa Office Integration, Inc. v. FTF Business Systems, Inc., 132 F. Supp.2d 215, 220 (S.D.N.Y. 2001)*.

The standard for reviewing the actions of arbitrators in a case such as this was set forth by Judge Batts of this Court in *Bisnoff v. King, 154 F. Supp.2d 630, 636-37 (S.D.N.Y. 2001)*:

The FAA provides that an arbitration award may be vacated if: (1) the award was procured by corruption, fraud, or undue means; (2) the arbitrators exhibited "evident partiality" or "corruption"; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their power. See *9 U.S.C. § 10(a)*; *Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 n. 2 (2d Cir.1998)*, cert. denied, *526 U.S. 1034, 119 S. Ct. 1286, 143 L. Ed. 2d 378 (1999)*.

In the context relevant here, a court may vacate an award when "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy ..." *9 U.S.C. § 10(a)(3)*. "Misconduct typically arises where there is proof of either bad faith or gross error

on the part of the arbitrator." *Agarwal v. Agarwal, 775 F. Supp. 588, 589 (S.D.N.Y.1991)* (citing *United Paperworkers Int'l v. Misco, Inc., 484 U.S. 29, 40, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987))*.

The expeditious resolution of disputes requires that arbitrators be provided [*6] with broad discretion and great deference in their determinations of procedural adjournment requests. See *Alexander Julian, Inc. v. Mimco, Inc., 2001 U.S. Dist. LEXIS 5744,* No. 00 Civ. 4131(DC), *2001 WL 477010,* at *2 (S.D.N.Y. May 4, 2001) (citing *Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2nd Cir. 1997); Prozina Shipping Co. v. Elizabeth-Newark Shipping, Inc., 1999 U.S. Dist. LEXIS 14298, No. 98 Civ. 5834, 1999 WL 705545,* at *2-3 (S.D.N.Y. Sept.10, 1999)). In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a "fundamentally unfair" proceeding. See *Ottawa Office Integration, Inc. v. FTF Bus. Sys., Inc., 132 F. Supp.2d 215, 220 (S.D.N.Y.2001)* (citing *Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir.1997); Roche v. Local 32B-32J Service Employees Int'l Union, 755 F. Supp. 622, 625 (S.D.N.Y. 1991))*.

Thus, if there exists "'a reasonable basis for the arbitrators' considered decision not to grant a postponement,' a court should be reluctant to interfere with the award." *Ottawa, 132 F. Supp.2d at 220* (quoting *Roche, 755 F. Supp. at 625*). [*7] Stated another way, as long as there is at least "a barely colorable justification" for the arbitrators' decision not to grant an adjournment, the arbitration award should be enforced. *Alexander Julian, 2001 U.S. Dist. LEXIS 5744,* [WL] at *2 (citing *Landy Michaels Realty Corp. v. Local 32B-32J,Serv. Employees Int'l Union, 954 F.2d 794, 797 (2d Cir.1992))* (additional citations omitted).

On the record before them, the arbitrators clearly acted reasonably in denying an application for a continuance made on the day of a hearing which had been scheduled more than seven months earlier. At the time the continuance was sought, the proceeding had been pending for over a year and

a half and ten months earlier, Petitioners had been granted a delay to accommodate their counsel. In addition, six weeks before the hearing, in response to notice from Petitioners' counsel that he intended to seek a stay of the arbitration, the arbitrators had issued a notice that they intended to proceed with the arbitration on the day scheduled unless a court ordered a stay. At the time the application was made, the hearing was about to commence and Fiserv's counsel and two witnesses had come to New York from Colorado for the hearing.

It was also significant that the arbitration appeared to be a straight forward action to collect monies due on margin accounts and no argument was made that the monies were not due.[1]

Petitioners try to avoid the fact that the record before the arbitrators fully supported the refusal to grant a continuance by arguing that they had been mislead as to the status of the arbitration by Mr. Zimmer. The first thing to be noted about this argument is that it is hard to fault the arbitrators for not being sympathetic to this argument when it was never mentioned to the arbitrators.

Counsel who sought the continuance stated that he represented all of the Respondents--Petitioners here--including Mr. Zimmer, and that he had been retained by Mr. Zimmer to represent the Respondents. While this same counsel now argues that Zimmer did not have authority to represent some of the Respondents, he never said that to the arbitrators.

Thus, there was nothing before the arbitrators to suggest that the application for a continuance was anything other than a last ditch effort to avoid a judgment for amounts

---

[1] Counsel for Petitioners argued that the arbitrators should delay the proceeding until the resolution of an action pending in Michigan asserting fraud claims against Interface and one of its principal officers. However, it is unclear even to this date what information relevant to the call on Petitioners' margin accounts would be discovered in that action.

legitimately due by bringing in new counsel. In these circumstances, the decision to refuse a continuance was entirely appropriate.

Nor does the fact that some of the Petitioners now claim that Mr. Zimmer had mislead them with respect to the status of the arbitration proceeding justify vacating the arbitration award. While the FAA provides that an award may be vacated if it has been procured "by corruption, fraud, or undue means," Fiserv did not procure the award by corruption, fraud or undue means. If Mr. Zimmer acted fraudulently or corruptly with respect to any of these Petitioners, their remedy is to be found in an action against him.

The record is clear that all of the Petitioners were aware of the pendency of the arbitration and the other related actions and that they had relied on Mr. Zimmer to retain counsel in those actions and to protect their interests. Some of the Respondents now claim that they believed that the firm of Ballon, Stoll, Bader & Nadler was representing them in the arbitration and were unaware that Zimmer, a lawyer, had fired that firm and had undertaken the representation himself. While it is true that the Ballon firm did appear in the arbitration proceedings for the Petitioners, the Petitioners acknowledge, at a minimum, that Zimmer had been acting for them in selecting counsel and some of them admit that they believed that Zimmer was acting as co-counsel with the Ballon firm. It is also clear that none of the Respondents paid close attention to the arbitration and all of them relied on Zimmer to act as their agent with respect to the various proceedings related to their investment in Interface. Since Zimmer was acting as their agent, the fact that he failed to carry out those duties properly may give rise to an action against him but should not deprive Fiserv of an arbitration award it obtained fairly. See *McCarthy v. Smith Barney Inc., 58 F. Supp. 2d 288, 294 (S.D.N.Y. 1999)* ("ineffective assistance of counsel is not among the specified grounds for vacating an award under the [*Federal] Arbitration Act.*");

Borop v. Toluca Pacific Secs. Corp., 1997 U.S. Dist. LEXIS 20518, No. 97 Civ. 4591, 1997 WL 790588 at *3 & n.8 (N.D. Ill. 1997).

Moreover, when Zimmer announced that he was replacing the Ballon firm, Fiserv's counsel raised the question of a possible conflict of interest with the arbitrators since Zimmer was a party. Not only did Zimmer assure the panel that he was a lawyer who was experienced in handling arbitration proceedings and was authorized to do so by his clients, but the arbitrators directed the NASD to send out letters to all the Respondents asking them to confirm that Zimmer represented them. Letters were then sent to all Respondents and a majority affirmatively responded that Zimmer represented them. None wrote back to deny that Zimmer had authority to represent them. In view of the substantial response confirming that Zimmer was authorized to represent the Respondents and the fact that there was no contrary response, there was nothing unreasonable in the panel accepting Zimmer's representation that he was authorized to appear for all of the Respondents.[2]

The record refutes the claim of the Respondents that they lacked adequate notice of the hearing. All of the Respondents contend that they were relying on the Ballon firm to protect their interests in the arbitration. Since that firm had notice of the May 20th hearing date, there was no requirement that the individual Respondents also had to be given notice of the date. It is well settled that [HN6] when a party to a proceeding is represented by counsel, notice to that counsel is notice to the party. *Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734 (1962)* [HN7] (a litigant "is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'") (quoting *Smith v. Ayer, 101 U.S. 320, 326, 25 L. Ed. 955 (1879))*. See also

---

[2] Nor does the fact that one of the letters was mailed to a wrong address invalidate the reasonableness of the arbitrators' reliance on Zimmer's representation

[*13] *York Research Corp. v. Langarten, 927 F.2d 119, 122 (2d Cir. 1991).*

Moreover, the record indicates that the Ballon firm gave actual notice of the hearing date to the Petitioners. After its application for an adjournment of the originally scheduled hearing date was granted, Mr. Jaffe, of that firm, wrote to the NASD on September 10, 2001 that he had consulted with his clients about their availability for a hearing and suggested several dates in April, 2002. Thereafter, Mr. Jaffe received a letter from the NASD advising him that the hearing would take place on May 20-24, 2003. On October 17, 2001, Mr. Jaffe sent a letter to the NASD relating to discovery issues in which he noted that the hearing was scheduled to begin in the third week in May. Both of these letters from Mr. Jaffe to the NASD reflect that copies were sent to the Respondents.

Thus, the Petitioners had both actual and constructive notice of the May 20th, 2003 hearing date. Their professed failure to take any action to inform themselves of the preparations for that hearing or the desirability of their attending the hearing speaks more to their lack of care about the proceeding than a defect in the proceeding itself.

One of the Petitioners, Martin Newman, claims that he is in a unique position because the letter sent by the NASD to him asking that he confirm that Mr. Zimmer represented him was mailed to the wrong address. However, despite his present protestations and attacks on Mr. Zimmer, there is no reason to believe that, had he received the letter, Newman would have denied that Zimmer represented him. The original memorandum of law supporting his petition contained the statement, "Zimmer induced Mr. Newman to allow Mr. Zimmer to represent the Respondents, including Mr. Newman, as either the attorney or as the 'lead respondent.'" (Petitioner's Mem. of Law in Support of Vacating Arbitration Award at 4). In his petition, Newman swore that he had read the Memorandum and that "all the allegations therein ... are truthful, accurate and I adopt them ...." In light of this sworn statement that he agreed to have

Zimmer represent him in the arbitration proceeding, Newman's claim that he relied solely on the Ballon firm has a decidedly hollow ring and cannot be accepted. See *Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969)* ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."); *United States v. Dercacz, 530 F. Supp. 1348, 1351 (E.D.N.Y. 1982).*

But even if one were to credit Newman's assertion that he never authorized Zimmer to represent him, that would not provide a reason to vacate the arbitration award. As noted above, the Ballon firm, on which Newman claims he relied, had notice of the May 20th hearing date and had provided notice of that date to Newman. Like the other Petitioners who had both actual and constructive notice of the hearing date, Newman cannot blame his failure to see that his interests were protected on the arbitration panel.

Petitioners' arguments that the arbitrators should have delayed the proceeding until this Court heard an application for an injunction to stay the arbitration and that there were procedural defects in the arbitration process are completely without merit. Since this Court denied an application to stay the arbitration, the arbitrators were free to make their own decision. Any failure of the arbitrators to follow the procedural rules with respect to discovery were waived because they were not presented to the arbitrators. *York Research Corp. v. Langarten, supra.*

For the foregoing reasons, the motion to confirm the arbitration award is granted and the motions to vacate the award are denied.

SO ORDERED.

Dated: July 14, 2003
JOHN S. MARTIN, JR., U.S.D.J.

United States Court of Appeals
For the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York, New York 10007

Roseann B. MacKechnie, Clerk

Date:	9/15/04
Docket Number:	03-7943-cv
Short Title:	Congressional Sec. v. Fiserv Correspondent
DC Docket Number:	02-cv-3740
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable John Martin

Filed under seal of the United States Court of Appeals dated September 16, 2004.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York on the 16th day of September two thousand four.

Present:

Hon. Roger J. Minor,
Hon. Rosemany S. Pooler,
CIRCUIT JUDGES
Hon. Richard W. Goldberg,
DISTRICT JUDGE

Congressional Securities, Inc. v. Fiserv Correspondent Services, Inc.

A petition for panel rehearing having been filed herein by [all Petitioners],

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By: Arthur M. Heller, Motions Staff Attorney
September 16, 2004

On Form AO 88 (rev 11/94) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

TO:

Steven D. Plissey
Counsel for Fiserv
Sherman & Howard LLC
633 Seventeenth Street
Suite 3000
Denver, Colorado 80202-3624

EXHIBIT A

1. Subpoena for account records of Petitioners.
2. All documents produced by respondents in connection with the NASD Dispute Resolution, Inc. arbitration proceeding entitled Fiserv Correspondent Services, Inc. v. Congressional Securities, Inc., Case No. 00-03756.

FROM:

David H. Fry
Counsel for Interface
Munger, Tolles & Olson, LLP
33 New Montgomery Street
San Francisco, California 94131

NOTES OF INTERFACE PRESIDENT ROBERT NERO - FISERV MEETING 6/7/00 – DENVER COLORADO

Geo. Johnson, President of Fiserv
Bob B., Officer of Fiserv

1. Price of Stock
2. Still Own 9%
3. Selling Judiciously
4. Block Interest – Direct to Bob B.
5. Pursuing Dave Z. – 2 Years

NOTICE OF NON-PARTY FAULT

Defendant Robert A. Nero, by his attorneys, and based in part on information disclosed in discovery, hereby gives notice that the following non-parties are or may be at fault for the harm that plaintiffs allegedly suffered:

Fiserv Securities, Inc., as successor in interest to Fiserv Correspondent Services, Inc., ("Fiserv"), One Commerce Square, 2005 Market Street, Philadelphia, Pennsylvania 19103-3212. Fiserv may be at fault because, as the clearing broker for Congressional Securities, it knew or should have known of the wrongful acts committed by David Zimmer and Congressional Securities towards plaintiffs (as alleged in Counterclaims asserted by defendants) and was in a position to prevent or remedy those wrongful acts.

Submitted By:

David H. Fry
Counsel for Interface
Munger, Tolles & Olson, LLP
33 New Montgomery Street
San Francisco, California 94131
May 6, 2003